

# California Energy Commission Tribal Consultation Policy

Final Draft Policy – November 2014

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The purpose of this policy is to fulfill the California Governor's Executive Order B-10-11 and the California Natural Resources Agency (Resources Agency) tribal consultation policy to ensure effective government-to-government consultation between the California Energy Commission (Energy Commission) and tribal entities to further the Energy Commission's mission and to provide meaningful tribal input into the development of regulations, rules, policies, plans, and activities that may affect tribal communities.

**WHEREAS** Governor Brown signed Executive Order B-10-11 on September 19, 2011, directing State agencies and departments, including the Resources Agency and the Energy Commission, to engage in effective government-to-government<sup>i</sup> cooperation, collaboration, communication, and consultation with tribal entities<sup>ii</sup> concerning the development of legislation, regulations, rules, and policies on matters that may affect tribal entities.

**WHEREAS** the Resources Agency has adopted a Final Tribal Consultation Policy (dated November 2012) that implements Executive Order B-10-11 by:

- recognizing tribal sovereignty over their territories and members;
- acknowledging that tribes and tribal communities possess distinct cultural, spiritual, environmental, economic and public health interests and unique traditional cultural knowledge about California resources;
- recognizing tribal interests concerning various kinds of state resources and the agency's responsibility for managing the state's natural, historical and cultural resources;
- defining effective government-to-government consultation as open, inclusive, regular, collaborative and implemented in a manner that is respectful, shares responsibility and provides for the free exchange of information concerning Resources Agency regulations, rules, policies, programs, projects, plans, property decisions and activities; and
- identifying specific actions as follows:
  1. Outreach: identify tribal government and community (entities) contacts early in the project planning process, invite tribal entities to participate in open dialogue, and exchange information per established mechanisms and do so in a repeated manner as appropriate.
  2. Tribal Liaison: establish department<sup>iii</sup> tribal liaison(s) that, on behalf of a respective department, will act as central points of contact for tribal entities. The tribal liaison's role is to ensure that department outreach and communications are consistent with the Resources Agency's Tribal Consultation Policy. Tribal liaisons are also to develop ongoing and regular communication with tribal representatives.
  3. Tribal Liaison Committee: the committee of Agency tribal liaisons, established to function on a regular basis for the purposes of coordinating agency-wide tribal consultation efforts.
  4. Access to Contact Information: work with the Native American Heritage Commission (NAHC) to maintain a contact list of tribal entities.

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5. Training: provide training that assists departments in implementing tribal consultation policy.

**THEREFORE** the Energy Commission adopts the following Tribal Consultation Policy that:

1. Identifies the unique mission of the Energy Commission as guided by the Warren-Alquist Act, Rules of Practice and Procedure & Power Plant Site Certification regulations and other energy regulations (Regulations) and the needs of the various actions<sup>iv</sup> in which the Energy Commission engages;
2. Identifies the Energy Commission Tribal Liaison and other Assistant Tribal Liaisons;
3. Affirms Energy Commission Tribal Liaison participation in the Natural Resources Agency Tribal Liaison Committee;
4. Outlines the Energy Commission's 10-Step tribal consultation process;
5. Provides mechanisms for exchanging confidential information;
6. Stipulates docketing and public disclosure of Energy Commission tribal communications;
7. Suggests ways for fostering long term relationships; and
8. Lists applicable training opportunities that will assist Energy Commission personnel in implementing the Energy Commission Tribal Consultation Policy.

## ENERGY COMMISSION MISSION, DIVISIONS AND RELATED ACTIONS

The Energy Commission is the state's primary energy policy and planning agency. Created by the Legislature in 1974 and located in Sacramento, six basic responsibilities guide the Energy Commission as it sets state energy policy:

- Forecasting future energy needs;
- Promoting energy efficiency and conservation by setting the state's appliance and building efficiency standards;
- Supporting public interest energy research that advances energy science and technology through research, development and demonstration programs;
- Fostering the development of renewable energy resources and alternative renewable energy technologies for buildings, industry and transportation;
- Licensing thermal power plants 50 megawatts or larger;
- Planning for and directing state response to energy emergencies.

The Energy Commission mission is implemented through six divisions and two other key units, that can have little, some, or much reasonable cause to consult with tribal entities. These organizational units are listed below:

1. Commissioners
2. Executive Office
3. Energy Assessments Division
4. Energy Research and Development Division

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5. Efficiency Division
6. Renewable Energy Division
7. Fuels and Transportation Division
8. Siting, Transmission and Environmental Protection Division.

The following list provides examples of Energy Commission actions that may require tribal consultation:

- development of regulations, rules, and policies
- development of programs
- development of local, regional or statewide plans
- environmental review
- power plant siting and compliance activities

### ENERGY COMMISSION TRIBAL LIAISON AND ASSISTANT TRIBAL LIAISONS

The Energy Commission Tribal Liaison position shall be vested in the Deputy Director of Siting, Transmission, & Environmental Protection (STEP) Division. Tribal Liaison responsibilities include the following:

- review, comment or sign as appropriate all correspondences to tribal entities on behalf of Energy Commission staff,
- be an available participant in government-to-government meetings among tribal entities and the Energy Commission, and
- lead Energy Commission initiatives for fostering long-term Energy Commission/Tribal relationships.

The STEP Deputy Director may designate an Assistant Tribal Liaison from among the STEP Division staff. The other Deputy Directors from the divisions listed above are required to designate Assistant Tribal Liaisons from among their respective staff. In the absence of a designation, the Deputy Director of the respective division will assume the Assistant Tribal Liaison responsibility.

Tribal entities may choose to become interveners in the Energy Commission energy facility siting process, and if selecting to assume an intervening role, such tribal entities will coordinate with the Public Adviser's Office. Contact information for the Energy Commission Tribal Liaison, Assistant Tribal Liaison(s), and the Public Adviser's Office are provided in Appendix 1.

The Energy Commission Tribal Liaison shall coordinate among the Assistant Tribal Liaison(s) by holding quarterly meetings for the purposes of sharing information, discussing project-specific tribal issues, planning tribal energy summits, preparing energy commission tribal issues training venues, and conducting "lessons learned" exercises.

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## ENERGY COMMISSION TRIBAL LIAISON PARTICIPATION IN NATURAL RESOURCES AGENCY TRIBAL LIAISON COMMITTEE

The Energy Commission Tribal Liaison will be the initial point of contact for participating in the Natural Resources Agency Tribal Liaison Committee. It is the Energy Commission Tribal Liaison's responsibility to fully participate, be aware of, and attend Natural Resources Agency Tribal Liaison Committee meetings, forums and functions.

The Energy Commission Tribal Liaison may delegate participatory responsibility to an Assistant Tribal Liaison when other duties or circumstances prevent the Energy Commission Tribal Liaison's participation.

## ENERGY COMMISSION'S 10-STEP TRIBAL CONSULTATION PROCESS

The Governor's Executive Order B-10-11 and the Resources Agency Tribal Consultation Policy require tribal consultation to be initiated when state agencies engage in legislation, regulation, rules, policy, programs, projects, plans, property decisions and activities. However, the majority of actions that the Energy Commission engages in concern actions related to projects that must be compliant with the California Environmental Quality Act (CEQA). The following 10-step process provides an outline for generally processing tribal consultations and should be closely followed should an Energy Commission Division engage as a lead agency in actions that aim to fulfill CEQA requirements related to the processing of Environmental Impact Reports, Mitigated Negative Declarations and Negative Declarations.

The following 10-step process outlines the steps to follow for achieving effective consultation.

1. Tribal Liaison Determination of the Energy Commission Level of Effort for Initiating/Conducting/Furthering Tribal Outreach/Consultation
2. Assemble and Send to the Native American Heritage Commission a Request to Check the Sacred Lands File and Provide a Current List of Tribal Entities Interested in the Project Area
3. Receive and Review the Native American Heritage Commission's Response
4. Assemble and Mail an Energy Commission "Request to Consult" Letter to Tribal Entities.
5. Research Tribal Entities and Related Cultures
6. Follow Letters with Phone and Email Outreach
7. Document Energy Commission Consultation Efforts and Tribal Responses
8. Follow-up on Any Tribal Requests and Otherwise Take into Account Tribal Comments
9. Call Again Half-way through the Process or in Advance of a Project Milestone, Decision Point, or Prior to Comment Deadlines on Energy Commission actions regarding Regulations, Rules, Policies, Programs, Projects, Plans, Property Decisions and Activities
10. Summarize and File Energy Commission's Tribal Consultation Efforts, Including any Substantive Tribal Issues Raised and Responsive Actions Taken. File all Summaries with Tribal Liaison on a Quarterly Basis.

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## **INFORMATION CONFIDENTIALITY**

During the course of collaboration and communication, Energy Commission staff and tribal entities may have the need to exchange confidential information. Information exchange is a two-way function. The Energy Commission may have confidential information, such as applicant cultural resources reports that tribal entities may wish to peruse. Tribal entities may have confidential information, such as cultural resources records and oral history transcripts, that Energy Commission staff may wish to peruse. Subject to any other legal regulation, code, or agreement, Energy Commission staff will condition and document transmission of confidential information that Energy Commission staff provide to, or receive from, tribal entities by means of a Confidential Information Non-Disclosure Agreement specifically tailored to cover such transmissions. Tribal entities may have comparable agreements that may be used in lieu of the Energy Commission Agreement template, subject to Energy Commission legal review.

## **DOCKETING AND PUBLIC DISCLOSURE OF ENERGY COMMISSION TRIBAL COMMUNICATIONS**

The following project-specific consultation information will be docketed:

- The Energy Commission letter to NAHC that requests the list of tribal entities interested in the project area and Sacred Lands File check.
- The NAHC response letter.
- All letters sent to listed tribal entities that provide requests to participate in project consultation.
- Any letters from non-listed tribal entities requesting to participate in project consultation.
- Any Energy Commission response letters to non-listed tribal entities, requesting to participate in project consultation.
- Any tribal letters and Energy Commission response letters transmitted under official letterhead.

## **JOINT STATE AND FEDERAL TRIBAL CONSULTATION COORDINATION**

Projects that are within Energy Commission regulatory authority may also involve other federal and state agencies such as the Bureau of Land Management (BLM), Department of Energy (DOE), the Western Area Power Administration (WAPA) and the California Department of Fish and Wildlife. Each agency has its federal or state regulatory authorities, laws, regulations and policies, including tribal consultation orders, memos and policies for which the respective federal agencies must comply. Coordination among federal and state agencies can be challenging because 1) the federal agencies are only required to consult with federally recognized tribal governments within the Government-to-Government framework, 2) because

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federal agencies are required to comply with the National Environmental Protection Act and the National Historic Preservation Act, and these requirements require regulatory review timelines of greater duration than state equivalent regulatory processes and, 3) because, unlike the state, federal agencies have a fiduciary responsibility to protect tribal trust resources and interests. Consistent with DOE tribal government consultation policy Section VII, that calls for DOE – State communication and cooperation, the Energy Commission will consider the following set of activities in order to facilitate effective communication and cooperation with federal and state agencies that have a nexus with Energy Commission actions.

- Early and ongoing interagency communication
- Coordination of tribal contact lists
- Joint tribal consultation meetings when feasible and acceptable to tribes

However Energy Commission consultation activities should not be construed by federal agencies to singularly fulfill federal tribal consultation responsibilities, and federal agency consultation activities should not be construed by the Energy Commission to singularly fulfill state tribal consultation responsibilities. There may be Energy Commission actions where the agencies determine that agency-specific and potentially duplicative consultation efforts are in the best interest of the Energy Commission or federal or other state agencies.

### FOSTERING LONG TERM ENERGY COMMISSION / TRIBAL RELATIONSHIPS

In addition to project-by-project consultations, the Energy Commission wishes to foster long term positive relations with tribal entities. In order to foster long term relations, the Energy Commission may engage in the following activities.

- Convene short term tribal task forces
- Host or co-host annual State-Federal-Tribal energy summits
- Enter into agreements with Tribes to tailor tribal and Energy Commission processes that further facilitate consultations, information exchange, technical assistance, and funding

### ENERGY COMMISSION TRIBAL CONSULTATION TRAINING

From time to time Energy Commission staff will benefit from training venues and forums that may enhance Energy Commission staff performance per this policy. Such trainings may include the following:

- Various “Tribal Consultation” trainings provided by other federal or state governments, or private sector training institutions,
- Tribal cultural resources, sacred sites and traditional cultural property training, and
- Energy Commission generated Tribal trainings.

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## APPENDIX 1

### CONTACT INFORMATION FOR ENERGY COMMISSION TRIBAL LIAISON AND ASSISTANT TRIBAL LIAISONS

#### ENERGY COMMISSION TRIBAL LIAISON

Name: Roger Johnson

Title: Deputy Director of Siting, Transmission and Environmental Protection

Phone: 916 654 5100

Email: [roger.johnson@energy.ca.gov](mailto:roger.johnson@energy.ca.gov)

#### Siting, Transmission and Environmental Protection Assistant Tribal Liaison

Name: Thomas Gates

Title: Cultural Resources Analyst

Phone: 916 654 5008

Email: [thomas.gates@energy.ca.gov](mailto:thomas.gates@energy.ca.gov)

#### Public Adviser's Office Assistant Liaison

Name: Alana Matthews

Title: Public Adviser

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## ENDNOTES

<sup>i</sup> Governments have many types of relations: with constituents, businesses, sub-governments, supra-governments, and other governments. The federal government recognizes tribes as other governments or sovereign self-determining entities with dependent nation status. This recognition, echoed in California State Policies, is also applied to the many federally recognized and un-recognized tribes located in California. The phrase “government to government” in the strictest sense, evokes a relationship between separate but equal governmental entities. Therefore the evocation of a “true, meaningful or effective” government-to-government consultation would be a consultation where equivalent persons of position with vested decision-making authority participate. Meetings held among persons of disparate positions of authority can still be useful for information exchange, or initial outreach. The Energy Commission government-to-government tribal consultation requirement cannot be abrogated or delegated to any third parties such as applicants, owners, loan or grant recipients or consultants.

<sup>ii</sup> The Native American Heritage Commission provides consultation lists that include tribal governments, tribal organizations and tribal individuals. Various state legislation, regulation, policy and guidelines refer to tribal governments, tribal organizations or tribal individuals by various terms. For the purposes of this policy “tribal entities” includes the following: tribes, tribal governments, Native American tribes, California tribes, California Indian tribes, California Native American tribes, federally recognized tribes, non-recognized tribes, California tribal communities, tribal communities, tribal consortia, Native American Non Governmental Organizations, California Native Americans, California Indians, Native Americans, Indians, and tribal people.

<sup>iii</sup> The Resources Agency’s policy defines department as “any department, board, commission, council or conservancy subject to [gubernatorial] executive control.”

<sup>iv</sup> “Actions” is defined herein as the development of legislation, regulations, rules, policies, programs, development of local, regional, or statewide plans; property decisions, granting of funds; and certification, amending, or compliance monitoring of energy facilities.